



## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 10

[Docket No. FWS–HQ–MB–2018–0090; FF09M22000-212-FXMB1231099BPP0]

RIN 1018–BD76

### Regulations Governing Take of Migratory Birds; Revocation of Provisions

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** On January 7, 2021, we, the U.S. Fish and Wildlife Service (we, the Service, or USFWS), published a final rule (January 7 rule) defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. We now revoke that rule for the reasons set forth below. The immediate effect of this final rule is to return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and longstanding agency practice prior to 2017.

**DATES:** This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].

**FOR FURTHER INFORMATION CONTACT:** Jerome Ford, Assistant Director, Migratory Birds, at 202–208–1050.

**SUPPLEMENTARY INFORMATION:** On January 7, 2021, we published a final rule defining the scope of the MBTA (16 U.S.C. 703 et seq.) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA (86 FR 1134) (hereafter referred to as the “January 7 rule”). The January 7 rule codified an interpretation of the MBTA set forth in a 2017 legal opinion of the Solicitor of the Department of the Interior, Solicitor’s Opinion

M-37050 (also referred to as the Jorjani Opinion), which concluded that the MBTA does not prohibit incidental take.

As initially published, the January 7 rule was to become effective 30 days later, on February 8, 2021. However, on February 4, 2021, USFWS submitted a final rule to the *Federal Register* correcting the January 7 rule's effective date to March 8, 2021, to conform with its status as a "major rule" under the Congressional Review Act, which requires a minimum effective date period of 60 days, *see* 5 U.S.C. 801(a)(3) and 804(2). The final rule extending the effective date of the January 7 final rule itself became effective when it was made available for public inspection in the reading room of the Office of the Federal Register on February 5, 2021, and was published in the *Federal Register* on February 9, 2021 (86 FR 8715). In that document, we also sought public comment to inform our review of the January 7 rule and to determine whether further extension of the effective date was necessary.

After further review, we decided not to extend the effective date of the January 7 rule beyond March 8. We acknowledged that the January 7 rule would remain in effect for some period of time even if it is ultimately determined, after notice and comment, that it should be revoked. But rather than extending the effective date again, we determined that the most transparent and efficient path forward was instead to immediately propose to revoke the January 7 rule. The proposed rule provided the public with notice of our intent to revoke the January 7 rule, subject to our final decision after consideration of public comments.

We have undertaken further review of the January 7 rule and considered public comments on our proposed revocation rule and determine that the January 7 rule does not reflect the best reading of the MBTA's text, purpose, and history. It is also inconsistent with the majority of relevant court decisions addressing the issue, including the decision of the District Court for the Southern District of New York on August 11, 2020 that expressly rejected the rationale offered in the rule. The January 7 rule's reading of the MBTA also raises serious concerns with Canada, a United States' treaty partner, and for the migratory bird resources

protected by the MBTA and underlying treaties. Accordingly, we revoke the January 7 rule and remove the regulation codifying the interpretation set forth in the January 7 rule at 50 CFR 10.14.

At this time, we have not proposed replacement language for the Code of Federal Regulations. This rulemaking simply removes the current regulatory language. A Director's Order clarifying our current enforcement position was issued at the time of this final rule's publication and will come into effect on the effective date of this final rule (see **DATES**). We will introduce new policies in the future, including a proposed regulation codifying an interpretation of the MBTA that prohibits incidental take and potentially a regulatory framework for the issuance of permits to authorize incidental take. Concurrent with this final rule, we have also published an advance notice of proposed rulemaking requesting public input on potential alternatives for authorizing incidental take of migratory birds and a Director's Order clarifying our current enforcement position. These new policies and regulatory actions will fully implement the new National Environmental Policy Act (NEPA) Record of Decision (ROD) associated with this revocation rule, which is available at <https://www.fws.gov/regulations/mbta/resources>.

The MBTA statutory provisions at issue in the January 7 rule have been the subject of repeated litigation and diametrically opposed opinions of the Solicitors of the Department of the Interior. The longstanding historical agency practice confirmed in the earlier Solicitor M-Opinion, M-37041, and upheld by most reviewing courts, had been that the MBTA prohibits the incidental take of migratory birds (subject to certain legal constraints). The January 7 rule reversed several decades of past agency practice and interpreted the scope of the MBTA to exclude any prohibition on the incidental take of migratory birds. In so doing, the January 7 rule codified Solicitor's Opinion M-37050, which itself had been vacated by the United States District Court for the Southern District of New York. This interpretation focused on the language of section 2 of the MBTA, which, in relevant part, makes it "unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill" migratory birds or attempt to do the same.

16 U.S.C. 703(a). Solicitor’s Opinion M–37050 and the January 7 rule argued that the prohibited terms listed in section 2 all refer to conduct directed at migratory birds, and that the broad preceding language, “by any means, or in any manner,” simply covers all potential methods and means of performing actions directed at migratory birds and does not extend coverage to actions that incidentally take or kill migratory birds.

As noted above, on August 11, 2020, a court rejected the interpretation set forth in Solicitor’s Opinion M–37050 as contrary to the MBTA and vacated that opinion. *Natural Res. Def. Council v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020) (“*NRDC*”). In late January 2021, two new lawsuits were filed that challenge the January 7 rule. *Nat’l Audubon Soc’y v. U.S. Fish & Wildlife Serv.*, 1:21-cv-00448 (S.D.N.Y. filed Jan. 19, 2021); *State of New York v. U.S. Dep’t of the Interior*, 1:21-cv-00452 (S.D.N.Y. filed Jan. 19, 2021). At the time the January 7 rule was published, the United States had filed a notice of appeal of the *NRDC* decision in the U.S. Court of Appeals for the Second Circuit. Since that time, the United States filed a stipulation to dismiss that appeal on February 25, 2021, and the Deputy Solicitor permanently withdrew M–37050 on March 8, 2021.

The District Court’s decision in *NRDC* expressly rejected the basis for the January 7 rule’s conclusion that the statute does not prohibit incidental take. In particular, the court reasoned that the plain language of the MBTA’s prohibition on killing protected migratory bird species “at any time, by any means, and in any manner” shows that the MBTA prohibits incidental killing. *See* 478 F. Supp. 3d at 481. Thus, the statute is not limited to actions directed at migratory birds as set forth in the January 7 rule. After closely examining the court’s holding, we are persuaded that it advances the better reading of the statute, including that the most natural reading of “kill” is that it also prohibits incidental killing.

The interpretation contained in the January 7 rule relies heavily on *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015) (*CITGO*). The Fifth Circuit is the only Circuit Court of Appeals to expressly state that the MBTA does not prohibit incidental take. In

*CITGO*, the Fifth Circuit held that the term “take” in the MBTA does not include incidental taking because “take” at the time the MBTA was enacted in 1918 referred in common law to “[reducing] animals, by killing or capturing, to human control” and accordingly could not apply to accidental or incidental take. *Id.* at 489 (following *Babbitt v. Sweet Home Chapter Cmty. for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia J., dissenting) (*Sweet Home*)). While we do not agree with the *CITGO* court’s interpretation of the term “take” under the MBTA, we further note that *CITGO* does not provide legal precedent for construing “kill” narrowly. The *CITGO* court’s analysis is limited by its terms to addressing the meaning of the term “take” under the MBTA; thus, any analysis of the meaning of the term “kill” was not part of the court’s holding.

Moreover, as discussed below and even though it was dicta, we also disagree with the *CITGO* court’s analysis of the term “kill.”

Although the *CITGO* court’s holding was limited to interpreting “take,” the court opined in dicta that the term “kill” is limited to intentional acts aimed at migratory birds in the same manner as “take.” *See* 801 F.3d at 489 n.10. However, the court based this conclusion on two questionable premises.

First, the court stated that “kill” has little if any independent meaning outside of the surrounding prohibitory terms “pursue,” “hunt,” “capture,” and “take,” analogizing the list of prohibited acts to those of two other environmental statutes—the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.) and the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.). *See id.* The obvious problem with this argument is that it effectively reads the term “kill” out of the statute; in other words, the *CITGO* court’s reasoning renders “kill” superfluous to the other terms mentioned, thus violating the rule against surplusage. *See, e.g., Corley v. United States*, 556 U.S. 303, 314 (2009).

Second, employing the *noscitur a sociis* canon of statutory construction (which provides that the meaning of an ambiguous word should be determined by considering its context within the words it is associated with), the Fifth Circuit argued that because the surrounding terms apply

to “deliberate acts that effect bird deaths,” then “kill” must also. *See* 801 F.3d at 489 n.10. The January 7 rule also relied heavily on this canon to argue that both “take” and “kill” must be read as deliberate acts in concert with the other referenced terms. Upon closer inspection though, the only terms that clearly and unambiguously refer to deliberate acts are “hunt” and “pursue.” Both the *CITGO* court and the January 7 final rule erroneously determined that “capture” can also only be interpreted as a deliberate act. This is not so. There are many examples of unintentional or incidental capture, such as incidental capture in traps intended for animals other than birds or in netting designed to prevent swallows nesting under bridges. Thus, the *CITGO* court’s primary argument that “kill” only applies to “deliberate actions” rests on the fact that just two of the five prohibited actions unambiguously describe deliberate acts. The fact that most of the prohibited terms can be read to encompass actions that are not deliberate in nature is a strong indication that Congress did not intend those terms to narrowly apply only to direct actions.

The *NRDC* court similarly rejected the January 7 rule’s interpretation of the term “kill” and its meaning within the context of the list of actions prohibited by the MBTA. The court noted the broad, expansive language of section 2 prohibiting hunting, pursuit, capture, taking, and killing of migratory birds “by any means or in any manner.” 478 F. Supp. 3d at 482. The court reasoned that the plain meaning of this language can only be construed to mean that activities that result in the death of a migratory bird are a violation “irrespective of whether those activities are specifically directed at wildlife.” *Id.* The court also noted that the *Sweet Home* decision relied upon by the *CITGO* court and the January 7 rule actually counsels in favor of a broad reading of the term “kill,” even assuming Justice Scalia accurately defined the term “take” in his dissent. The *Sweet Home* case dealt specifically with the definition of “take” under the ESA, which included the terms “harm” and “kill.” The majority in *Sweet Home* was critical of the consequences of limiting liability under the ESA to “affirmative conduct intentionally directed against a particular animal or animals,” reasoning that knowledge of the consequences of an act are sufficient to infer liability, including typical incidental take scenarios. *Id.* at 481–82.

The *NRDC* court went on to criticize the use of the *noscitur a sociis* canon in Solicitor’s Opinion M–37050 (a use repeated in the January 7 rule). The court reasoned that the term “kill” is broad and can apply to both intentional, unintentional, and incidental conduct. The court faulted the Solicitor’s narrow view of the term and disagreed that the surrounding terms required that narrow reading. To the contrary, the court found the term “kill” to be broad and not at all ambiguous, pointedly noting that proper use of the *noscitur* canon is confined to interpreting ambiguous statutory language. Moreover, use of the *noscitur* canon deprives “kill” of any independent meaning, which runs headlong into the canon against surplusage as noted above. The court did not agree that an example provided by the government demonstrated that “kill” had independent meaning from “take” under the interpretation espoused by Solicitor’s Opinion M–37050. By analogy, the court referenced the Supreme Court’s rejection of the dissent’s use of the *noscitur* canon in *Sweet Home*, which similarly gave the term “harm” the same essential function as the surrounding terms used in the definition of “take” under the ESA, denying it independent meaning. *See id.* at 484.

The *CITGO* court, M–37050, and the January 7 rule also cited potential constitutional concerns in rejecting an interpretation of the MBTA that prohibits incidental take—specifically that this interpretation results in implementing the MBTA in a vague and overbroad manner thus violating the constitutional right to due process. Although the *NRDC* court did not address these concerns because it found the language of the MBTA unambiguous in the context of its application to incidental take, these concerns also do not counsel in favor of rejecting that interpretation even if the relevant language is considered ambiguous. The constitutional concerns cited in the January 7 rule can be addressed simply by noting that the Act’s reach within the context of incidental take is limited by applying the standard legal tools of proximate causation and foreseeability—as explained by the Tenth Circuit in *United States v. Apollo Energies*, 611 F.3d 679 (10th Cir. 2010) and in M–37041—and by adopting policies and regulations that eliminate potential prosecutorial overreach and absurd results. Upon revocation of this rule, we

issued a Director's Order clarifying our current enforcement position and will consider developing a regulatory authorization framework, as explained below. These policies will eliminate any potential constitutional concerns by providing the public with adequate notice of the scope of potential liability under the MBTA and how any potential violations may be avoided or authorized.

In sum, after further review of the January 7 rule and the *CITGO* and *NRDC* decisions, along with the language of the statute, we now conclude that the interpretation of the MBTA set forth in the January 7 rule and Solicitor's Opinion M-37050, which provided the basis for that interpretation, is not the construction that best accords with the text, purposes, and history of the MBTA. It simply cannot be squared with the *NRDC* court's holding that the MBTA's plain language encompasses the incidental killing of migratory birds. Even if the *NRDC* court's plain-language analysis were incorrect, the operative language of the MBTA is at minimum ambiguous, thus USFWS has discretion to implement that language in a manner consistent with the conservation purposes of the statute and its underlying Conventions that avoids any potential constitutional concerns. Reference to case law in general or legislative history can be interpreted to bolster either interpretation as demonstrated by the relevant analysis in the January 7 rule versus that of the initial Solicitor's Opinion, M-37041, thus is of limited assistance if the relevant language is indeed ambiguous. In any case, the Service certainly has discretion to revoke the January 7 rule given the legal infirmities raised by the *NRDC* court and the rule's reliance on the *CITGO* decision.

To the extent that the primary policy justifications for the January 7 rule were resolving uncertainty and increasing transparency through rulemaking, we do not consider these concerns to outweigh the legal infirmities of the January 7 rule or the conservation purposes of the statute and its underlying Conventions. Interpreting the statute to exclude incidental take is not the reading that best advances these purposes or provides the most natural reading of section 2, which is underscored by the following additional reasons for revoking the current regulation.



First, the January 7 rule is undermined by the 2002 legislation authorizing military-readiness activities that incidentally take or kill migratory birds. In that legislation, Congress temporarily exempted “incidental taking” caused by military-readiness activities from the prohibitions of the MBTA; required the Secretary of Defense to identify, minimize, and mitigate the adverse effect of military-readiness activities on migratory birds; and directed USFWS to issue regulations under the MBTA creating a permanent exemption for military-readiness activities. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, Div. A, Title III, section 315 (2002), 116 Stat. 2509 (Stump Act). This legislation was enacted in response to a court ruling that had enjoined military training that incidentally killed migratory birds. *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 and 201 F. Supp. 2d 113 (D.D.C. 2002), *vacated on other grounds sub nom. Ctr. for Biological Diversity v. England*, 2003 U.S. App. Lexis 1110 (D.C. Cir. Jan. 23, 2003). Notably, Congress did not amend the MBTA to define the terms “take” or “kill.” Instead, Congress itself uses the term “incidental take” and provides that the MBTA “shall not apply” to such take by the Armed Forces during “military-readiness activities.” Moreover, Congress limited the exemption only to military-readiness activities, i.e., training and operations related to combat and the testing of equipment for combat use. It expressly excluded routine military-support functions and the “operation of industrial activities” from the exemption afforded by the 2002 legislation, leaving such non-combat-related activities fully subject to the prohibitions of the Act. Even then, the military-readiness incidental take carve-out was only temporarily effectuated through the statute itself. Congress further directed the Department of the Interior (DOI or the Department) “to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities.”

This would be an odd manner in which to proceed to address the issue raised by the *Pirie* case if Congress’ governing understanding at the time was that incidental take of any kind was not covered by the Act. Congress simply could have amended the MBTA to clarify that

incidental take is not prohibited by the statute or, at the least, that take incidental to military-readiness activities is not prohibited. Instead, Congress limited its amendment to exempting incidental take only by military-readiness activities, expressly excluded other military activities from the exemption, and further directed DOI to issue regulations delineating the scope of the military-readiness carve-out from the incidental-take prohibitions of the Act. All of these factors indicate that Congress understood that the MBTA's take and kill prohibitions included what Congress itself termed "incidental take."

In arguing that Congress's authorization of incidental take during military-readiness activities did not authorize enforcement of incidental take in other contexts, the January 7 rule cites the *CITGO* court's conclusion that a "single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded." *CITGO*, 801 F.3d at 491. It is true that the Stump Act did not, by its terms, authorize enforcement of incidental take in other contexts. It clearly could not do anything of the sort, based on its narrow application to military-readiness activities. Rather, the logical explanation is that Congress considered that the MBTA already prohibited incidental take (particularly given USFWS's enforcement of incidental take violations over the prior three decades) and there was no comprehensive regulatory mechanism available to authorize that take. Thus, it was necessary to temporarily exempt incidental take pursuant to military-readiness activities to address the *Pirie* case and direct USFWS to create a permanent exemption. This conclusion is supported by the fact that Congress specifically stated in the Stump Act that the exemption did not apply to certain military activities that do not meet the definition of military readiness, including operation of industrial activities and routine military-support functions.

On closer inspection, the *CITGO* court's analysis of the purposes behind enactment of the military-readiness exemption is circular. Assuming the military-readiness exemption is necessary because the MBTA otherwise prohibits incidental take only represents an implicit and huge expansion of coverage under the MBTA if it is assumed that the statute did not already prohibit

incidental take up to that point. But Congress would have had no need to enact the exemption if the MBTA did not—both on its terms and in Congress’s understanding—prohibit incidental take. The adoption of a provision to exempt incidental take in one specific instance is merely a narrowly tailored exception to the general rule and provides clear evidence of what Congress understood the MBTA to prohibit.

Second, further consideration of concerns expressed by one of our treaty partners counsels in favor of revoking the January 7 rule. The MBTA implements four bilateral migratory bird Conventions with Canada, Mexico, Russia, and Japan. *See* 16 U.S.C. 703–705, 712. The Government of Canada communicated its concerns with the January 7 rule both during and after the rulemaking process, including providing comments on the environmental impact statement (EIS) associated with the rule.

After the public notice and comment period had closed, Canada’s Minister of Environment and Climate Change summarized the Government of Canada’s concerns in a public statement issued on December 18, 2020 (<https://www.canada.ca/en/environment-climate-change/news/2020/12/minister-wilkinson-expresses-concern-over-proposed-regulatory-changes-to-the-united-states-migratory-bird-treaty-act.html>). Minister Wilkinson voiced the Government of Canada’s concern regarding “the potential negative impacts to our shared migratory bird species” of allowing the incidental take of migratory birds under the MBTA rule and “the lack of quantitative analysis to inform the decision.” He noted that the “Government of Canada’s interpretation of the proposed changes ... is that they are not consistent with the objectives of the Convention for the Protection of Migratory Birds in the United States and Canada.”

Additionally, in its public comments on the draft EIS for the MBTA rule, Canada stated that it believes the rule “is inconsistent with previous understandings between Canada and the United States (U.S.), and is inconsistent with the long-standing protections that have been afforded to non-targeted birds under the Convention for the Protection of Migratory Birds in the United States and Canada ... as agreed upon by Canada and the U.S. through Article I. The removal of

such protections will result in further unmitigated risks to vulnerable bird populations protected under the Convention.” After further consideration, we have similar concerns to those of our treaty partner, Canada.

The protections for “non-targeted birds” noted by the Canadian Minister are part and parcel of the Canada Convention, as amended by the Protocol between the United States and Canada Amending the 1916 Convention for the Protection of Migratory Birds in Canada and the United States, which protects not only game birds hunted and trapped for sport and food, but also nongame birds and insectivorous birds. For instance, the preamble to the Convention declares “saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless” as its very purpose and declares that “many of these species are ... in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds.” Convention between the United States and Great Britain (on behalf of Canada) for the Protection of Migratory Birds, 39 Stat. 1702 (Aug. 16, 1916). Thus, whether one argues that the language of section 2 of the MBTA plainly prohibits incidental killing of migratory birds or is ambiguous in that regard, an interpretation that excludes incidental killing is difficult to square with the express conservation purposes of the Canada Convention. Moreover, until recently there had been a longstanding “mutually held interpretation” between the two treaty partners that regulating incidental take is consistent with the underlying Convention, as stated in an exchange of Diplomatic Notes in 2008. While Canada expressed its position before the final rule published on January 7, upon review, we now have determined that the concerns raised by the United States’ treaty partner counsel in favor of revocation of the rule.

In addition to the Canada Convention, the January 7 rule may also be inconsistent with the migratory bird conventions with Mexico, Japan, and Russia. The Japan and Russia Conventions both broadly call for the parties to prevent damage to birds from pollution. *See* Convention between the Government of the United States of America and the Government of

Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, 25 U.S.T. 3329 (Japan Convention); Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, 29 U.S.T. 4647 (Russia Convention). The Protocols amending the Canada and Mexico Conventions contain similar language calling for the parties to seek means to prevent damage to birds and their environment from pollution. *See* Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds, Dec. 14, 1995, S. Treaty Doc. No. 104-28, T.I.A.S. 12721; Protocol Between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for the Protection of Migratory Birds and Game Mammals, May 5, 1997, S. Treaty Doc. No. 105-26.

Some of the relevant provisions include article IV of the Protocol with Canada, which states that each party shall use its authority to “take appropriate measures to preserve and enhance the environment of migratory birds,” and in particular shall “seek means to prevent damage to [migratory] birds and their environments, including damage resulting from pollution”; article I of the Mexico Convention, which discusses protecting migratory birds by “means of adequate methods[...]”; article VI(a) of the Japan Convention, which provides that parties shall “[s]eek means to prevent damage to such birds and their environment, including, especially, damage resulting from pollution of the seas”; and articles IV(1) and 2(c) of the Russia Convention, which require parties to “undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of that environment,” and, in certain special areas, undertake, to the maximum extent possible, “measures necessary to protect the ecosystems in those special areas ... against pollution, detrimental alteration and other environmental degradation.”

The January 7 rule eliminates a source of liability for pollution that incidentally takes and kills migratory birds—a position that is difficult to square with the mutually agreed upon treaty provisions agreeing to prevent damage to birds from pollution. The January 7 rule does not directly affect natural resource damage assessments conducted under the Comprehensive Environmental Response Compensation and Liability Act, the Oil Pollution Act, and the Clean Water Act to determine compensation to the public for lost natural resources and their services from accidents that have environmental impacts, such as oil spills. However, for oil spills such as the BP *Deepwater Horizon* Gulf oil spill and the *Exxon Valdez* oil spill in Alaska, significant penalties were levied in addition to those calculated under natural resource damage assessments based on incidental-take liability under the MBTA. Those fines constituted a large proportion of the total criminal fines and civil penalties associated with historical enforcement of incidental take violations. As noted in the EIS, the January 7 rule eliminates the Federal Government’s ability to levy similar fines in the future, thereby reducing the deterrent effect of the MBTA and the Federal Government’s ability to mitigate some of the harm by directing these fines to the North American Wetlands Conservation Act fund for the protection and restoration of wetland habitat for migratory birds.

In sum, the issues raised by the Government of Canada raise significant concerns regarding whether the January 7 rule is consistent with the Canada Convention, and questions also remain regarding that rule’s consistency with the other migratory bird Conventions. We note as well that the primary policy justifications for the January 7 rule were resolving uncertainty and increasing transparency through rulemaking. These concerns, however, do not outweigh the legal infirmities of the January 7 rule or the conservation objectives described above. In any case, the Service has issued a Director’s Order concurrently with this rule that explains in more detail our enforcement priorities regarding incidental take of migratory birds and published an advance notice of proposed rulemaking to seek public input on an authorization framework. Both actions will provide the public with more clarity and transparency regarding compliance with the

MBTA. On these bases, in addition to the legal concerns raised above, we revoke the January 7 MBTA rule.

## **Public Comments**

On May 7, 2021, the Service published in the *Federal Register* (86 FR 24573) a proposed rule seeking public comment on whether the Service should revoke the final rule published on January 7, 2020, that defined the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the Act. We solicited public comments on the proposed rule for 30 days, ending on June 7, 2021. We received 238 comments. Many comments included additional attachments (e.g., scanned letters, photographs, and supporting documents). These comments represented the views of multiple State and local government agencies, private industries, nongovernmental organizations (NGOs), and private citizens. In addition to the individual comments received, 3 of those comments were petitions that contained a total of 42,610 individual signatures supporting the revocation of the January 7 rule. We solicited public comments on the following topics:

1. Whether we should revoke the rule, as proposed, and why or why not;
2. The costs or benefits of revoking the rule;
3. The costs or benefits of leaving the rule in place; and
4. Any reliance interests that might be affected by revoking the rule, or not revoking the rule.

The following text presents the substantive comments we received and the Service's response to them.

*Comment:* There are other statutes besides the MBTA that protect birds, including NEPA, that industry would still have to comply with, and birds would continue to benefit from those protections. State and local laws also prevent the unnecessary killing of birds; therefore, it is unnecessary for the Service to revoke the January 7 rule.

*Service Response:* The Service recognizes that there are numerous reasons why an entity would continue to implement best practices, including other Federal or State laws, industry standard practices, public perception, etc. These mechanisms could reduce impacts to birds in some circumstances, but do not provide the uniform conservation protections that Federal regulation can provide. In any case, proper interpretation of the MBTA does not change based on whether other statutes or practices may be protective of migratory birds. Rather, the interpretation must be guided by the MBTA itself. Here, the Service believes the best path forward is to revoke the January 7 rule as it presents an interpretation that is not the best interpretation of the MBTA.

*Comment:* Several commenters stated that they were against revocation of the rule because it would create uncertainty by returning to inconsistent enforcement discretion when incidental take occurs under the MBTA.

*Service Response:* The Service acknowledges that this final rule, by its terms, simply revokes the January 7 rule by removing the regulatory language at 50 CFR 10.14 and does not purport to replace that regulation with new regulatory language at this time. However, upon revocation of the rule, the Service expects to develop a comprehensive regulatory framework governing MBTA compliance and enforcement to reduce public uncertainty and provide consistent implementation of the MBTA. To begin that process, we issued an advanced notice of proposed rulemaking concurrently with publication of this final rule that requests public input on a potential regulatory framework for authorizing incidental take under the MBTA. In addition, while certainty in application of the law is a significant consideration, ultimately the Service must interpret and implement the MBTA in a manner that best effectuates Congress' intent. For the reasons explained herein, the Service believes that the January 7 rule does not reflect the best reading of the MBTA's text, purpose, and history and therefore should be revoked.

*Comment:* Several commenters stated they were against the revocation of the final rule as it would create undue economic burden and expose industry to prosecution.



*Service Response:* The Service acknowledges that implementing best practices to reduce bird mortality from some industry sectors can include increased costs. However, during the January 7 rulemaking process, most industry sectors informed the Service that they would continue to implement best practices regardless of our regulatory position. Thus, we do not expect a significant increase in economic burden on these industries. Moreover, while consideration of regulatory burdens is undoubtedly important, ultimately the Service's interpretation of the MBTA must be guided by the MBTA itself.

*Comment:* The proposed rule does not reconcile varying court decisions or discuss how the Service would address MBTA enforcement.

*Service Response:* Upon revocation of the January 7 rule, the Service will apply enforcement discretion and not prioritize investigating projects that implement best practices to avoid and minimize impacts to migratory birds. Enforcement of the MBTA would be applied consistent with applicable case law. As noted in the proposed rule preamble, reference to case law can be used to bolster either interpretation as demonstrated by the relevant analysis in the January 7 rule concluding that case law bolsters the interpretation that the MBTA does not prohibit incidental take versus the opposite conclusion in the initial Solicitor's Opinion, M-37041. Thus, case law is of limited assistance and cannot be reconciled in adopting either interpretation. On balance, we conclude that case law generally favors an interpretation that the MBTA prohibits incidental take as explained in M-37041, but we acknowledge there are cases, such as the *CITGO* case in the Fifth Circuit Court of Appeals, that adopt the opposite interpretation. In the longer term, the Service expects to implement a comprehensive regulatory framework governing MBTA compliance and enforcement to reduce public uncertainty and provide consistent implementation of the MBTA.

*Comment:* Some commenters stated that the rule should not be revoked until an enforcement policy, general permit system, or *de minimis* standard for incidental take is developed.

*Service Response:* Given the Service's conclusion that the January 7 rule does not reflect the best interpretation of the MBTA, the Service decided that the appropriate initial step is to immediately revoke that rule before the Service considers a replacement policy or regulation. The Service issued a Director's Order concurrently with this final rule that clarifies how the MBTA will be implemented and enforced after this final rule becomes effective. The Service will consider developing an appropriate regulatory framework to authorize incidental take consistent with application of best management practices in the future.

*Comment:* Several commenters stated that they were neutral regarding revocation of the rule, but that if the Service finalized revocation, it should then promulgate a rule that creates a permitting program so that industry would have a means of compliance and legal certainty.

*Service Response:* Upon revocation of the January 7 rule, the Service will evaluate options to develop a formal approach to authorize compliance with the MBTA in the context of incidental take of migratory birds.

*Comment:* Some commenters stated they will continue to use best practices to avoid and minimize bird mortality regardless of the regulatory approach adopted by the Service.

*Service Response:* The Service acknowledges and appreciates industry efforts to reduce impacts on migratory birds regardless of MBTA policy positions. The Service envisions any future regulatory approach to authorizing incidental take will be rooted in the implementation of industry best practices. We will continue to work with industry to provide guidance on the appropriateness and implementation of those best practices.

*Comment:* Some commenters stated that, while reversing the rule was a positive first step, it must be followed by rulemaking that establishes an incidental take permitting system.

*Service Response:* Upon revocation of the January 7 rule, the Service will evaluate options for developing a regulatory approach to resolve any uncertainties pertaining to MBTA compliance. In the short term, the Service issued a Director's Order clarifying our current

enforcement position and an advanced notice of proposed rulemaking to inform development of a longer-term proposal to implement an incidental take authorization framework.

*Comment:* The Service should revoke the January 7 rule and return to the previous interpretation that incidental take is prohibited by the MBTA because that interpretation is more aligned with judicial precedent.

*Service Response:* We agree that the interpretation that incidental take is prohibited under the MBTA is consistent with judicial precedent in many jurisdictions and is the best interpretation of the law. Upon revocation of the January 7 rule, we will return to our prior interpretation that the MBTA prohibits incidental take. However, we will also engage in rulemaking to codify the interpretation that the MBTA prohibits incidental take to provide the public with greater clarity regarding what violations of the MBTA we will prioritize for enforcement.

*Comment:* One commenter argued that if the January 7 rule is revoked, all contracts affected by reliance on the January 7 rule need to be grandfathered to avoid impacting the terms under which those contracts were negotiated.

*Service Response:* Any contracts entered into that may be affected by reliance on the January 7 rule are not within the Service's jurisdiction to address. The Service does not have the authority to mandate any alteration of private contracts, nor does it believe it necessary to create a regulatory carve-out for contracts negotiated in good faith and placed into effect during the period between March 8 when the January 7 rule went into effect and the date this final rule will become effective (see **DATES**). We will continue to work with companies on a case-by-case basis and encourage implementation or continued use of best management practices that avoid or minimize incidental take of migratory birds. We will consider any potential effect of reliance on the short-term applicability of the January 7 rule in working with those companies and in prioritizing our enforcement resources.

As noted above, the Service requested comments on specific reliance interests that might be affected by revocation of the rule. We received several comments such as this one that generally stated how reliance interests may be affected by revoking the rule but without providing specific instances to corroborate those statements. No commenters identified any specific circumstances or situations where entities had relied on the January 7 rule and as a result their reliance interest would be affected by the rule's revocation. Moreover, many commenters noted that entities would continue to implement best management practices and conservation measures for a variety of reasons despite the January 7 rule, including compliance with federal and state regulations other than the MBTA.

*Comment:* Revocation of the January 7 rule is appropriate because birds provide substantial economic benefits via recreational bird watching/hunting and fines for MBTA violations contribute to bird conservation actions.

*Service Response:* The Service agrees that birds provide significant economic benefits for bird watching, bird hunting, and general enjoyment by the American public. Birds also provide critical ecosystems services reducing the costs and need for pest control, pollination, and other services beneficial to humans.

*Comment:* Many commenters supported revocation of the January 7 rule and urged the Service to work with States and industries to find best practices to balance industry needs and bird protections.

*Service Response:* The Service has and will continue to work with Federal and State agencies, NGOs, and industry to identify, develop, and evaluate actions that either avoid or minimize the impacts to migratory birds. The Service will continue to develop policies and regulations to further develop this cooperative approach. This approach will provide a resilient, long-term framework for implementing the MBTA that will provide long-term certainty to the regulated community and improved conservation of migratory birds.

*Comment:* Revoking the January 7 rule is best for bird conservation and reduces the chance that a species may eventually need to be listed as threatened or endangered.

*Service Response:* The Service agrees that working with Federal and State agencies, NGOs, and industry to avoid and minimize the incidental take of migratory birds is critical to the conservation of migratory birds and may reduce the number of bird species that require protection under the Endangered Species Act in the long term.

*Comment:* Existing science supports leaving the January 7 rule in place because predators are a significant source of threats to migratory birds according to a Service website (<https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>). Thus, the Service should focus its efforts and use scientifically sound conservation and policies to address those impacts.

*Service Response:* The Service agrees that predators are a source of mortality for birds. However, the rule the Service revokes applies to the incidental take of birds caused directly by human activities, not to predator impacts in general. Incidental take of birds is a leading cause of avian mortality, and the Service's revocation of the January 7 rule will help reduce the effects of incidental take on migratory bird populations. Moreover, proper interpretation of the MBTA does not change based on whether non-human factors adversely impact migratory birds. Rather, the interpretation must be guided by the MBTA itself.

*Comment:* The January 7 rule should be revoked because the MBTA has proven to be a highly successful tool for co-management, regulation, and mitigation of negative effects on migratory bird populations across State and international borders, strengthening the collaborative conservation efforts between State, Tribal, territorial, provincial, and Federal agencies as well as the four regional Flyway Councils. State agencies and their conservation partners have long expressed the need for the protections this rule would provide.

*Service Response:* The Service agrees the MBTA is one of the best tools for the conservation and management of migratory birds and looks forward to working with all stakeholders in developing additional steps to clarify its implementation of the MBTA in the

context of incidental take. The Service will provide the public with opportunities to comment on reasonable implementation alternatives throughout that process.

*Comment:* Repeal of the January 7 rule would greatly expand the Service's interpretation of the MBTA and expose incidental-take violations to criminal prosecution.

*Service Response:* The commenter is correct that revoking the January 7 rule will allow for prosecution of actions that incidentally take migratory birds. The Service will rely on judicious use of enforcement discretion to determine whether to enforce the statute in these situations as it did for decades prior to the recent change in interpretation codified by the January 7 rule.

*Comment:* The interpretation of the MBTA codified at 50 CFR 10.14 by the January 7 rule better accords with the language and purpose of the MBTA as passed by Congress. Focusing on the plain language of the MBTA and appropriate canons of statutory construction results in an interpretation consistent with that codified at 50 CFR 10.14, which thus should not be revoked.

*Service Response:* We disagree with the commenter for the reasons spelled out in the preamble to this final rule. Applying canons of statutory construction to the relevant language in the MBTA has resulted in courts reaching opposite conclusions regarding whether the plain language of the MBTA prohibits or excludes incidental take of migratory birds.

*Comment:* The Service should consult with other Federal agencies, including the Department of Justice to ensure that this rulemaking is constitutional.

*Service Response:* This rulemaking has undergone a rigorous interagency review process, as required by Executive Order 12866.

*Comment:* The Service's interpretation of the MBTA is not entitled to *Chevron* deference because *Chevron* deference is an unconstitutional abdication of the judicial role of independent judgment, violates the separation of powers, and contravenes due process.

*Service Response:* The Service is revoking the January 7 rule because it does not represent the best interpretation of the MBTA, whether the operative statutory language is plain or ambiguous. We do not opine here on the constitutionality of *Chevron* deference. Any concerns about whether the case giving rise to the concept of *Chevron* deference was correctly decided are both outside the Service's jurisdiction under the MBTA and, more to the point, not directly relevant to our decision to revoke the January 7 rule.

*Comment:* The proposed rule incorrectly focuses on five of the acts prohibited by the MBTA in section 703. But section 703 prohibits 22 acts, almost all of which involve deliberate acts. Thus, application of the *noscitur a sociis* canon strongly favors interpreting the prohibited acts to involve deliberate actions. Even if "take," "kill," and even "capture" are ambiguous terms that could apply to both direct and indirect actions, there are 19 other terms that apply to direct actions; therefore, the most natural reading is that Congress intended all 22 terms to apply to deliberate acts directed at migratory birds.

*Service Response:* As both the proposed rule, the January 7 rule, and the Jorjani Opinion all conclude, the operative terms that are relevant to determining whether the MBTA prohibits incidental take are the five terms "hunt, pursue, capture, kill, and take." The remaining 17 terms all relate to activities that comprise commercial use of migratory birds, which necessarily entail an act directed at migratory birds given they all require possession or attempted possession. The 17 actions related to commercial use are simply not relevant to whether the MBTA prohibits incidental taking or killing of migratory birds. Those actions are only relevant once a migratory bird has already been taken, captured, or killed. Given that at least two, and likely three, of the five operative terms are ambiguous and could apply to direct or incidental actions, application of the *noscitur a sociis* canon to bolster either interpretation is highly suspect.

*Comment:* The Service's reliance on the military-readiness authorization mandated by the Stump Act to demonstrate that Congress interpreted the MBTA at that time to prohibit incidental take is misplaced. The Stump Act stated that the MBTA does not apply to incidental take during

military-readiness activities in the first place and mandated that the Service issue a regulation acknowledging that such activities are not subject to the MBTA. The Stump Act provides for the continued exemption of any incidental take caused by military-readiness activities rather than providing for an authorization of incidental take by the Service.

*Service Response:* This argument relies on a selective reading of the Stump Act. The Stump Act's statement that the MBTA does not apply to military-readiness activities was not a general statement of the MBTA's applicability at that time, but instead a specific and temporary exemption for incidental take caused by military-readiness activities until the Service developed and published a rule specifically exempting those activities. Far from proving that the Service never had authority to prohibit incidental take caused by military-readiness activities in the first place, the explicit temporary nature of the exemption strongly implies the exact opposite. Moreover, the rule promulgated by the Service with the concurrence of the Secretary of Defense as required by the Stump Act calls for suspension or withdrawal of the authorization if certain conditions occur. Thus, the permanence of the exemption is conditional. The Stump Act describes the relevant regulations to be prescribed as both "authorizing incidental take" and "to exempt the Armed Forces for the incidental take of migratory birds." Thus, it is certainly reasonable to infer that the Service may condition that take as it did in the military-readiness rule whatever label is given to that authority.

*Comment:* The proposed revocation rule suggests that the Stump Act's explicit authorization of incidental take during military readiness activities "reflects a change in Congress' 'governing understanding' of the MBTA, and that henceforth incidental take from any activity other than military readiness activities could be criminally prosecuted."

*Service Response:* This is a mischaracterization of the proposed rule that echoes the Fifth Circuit's analysis of the Stump Act in *CITGO*. The Service does not argue that the military-readiness authorization represented a change in congressional interpretation of the MBTA that suddenly applied incidental take prohibitions to all activities not involving military readiness. In



fact, the opposite is true. The Stump Act makes clear that Congress already interpreted the MBTA to prohibit incidental take and the military-readiness exception would simply not have been necessary if Congress had instead considered the MBTA to exclude incidental take at that time. If Congress had considered the scope of the MBTA to exclude incidental take at the time and simply wanted to shield the military from further litigation over its military-readiness activities, it could easily have signaled that intent and clarified that it did not consider the MBTA to prohibit incidental take. The specific exceptions from the authorization in the legislation for non-readiness activities such as the routine operation of installation operating support functions are best understood not to support a reading that the authorization was intended as a narrow exemption to shield the military from further MBTA litigation even though Congress considered the MBTA not to prohibit incidental take.

*Comment:* If the Service revokes the January 7 rule, it will be free to use the responsible-corporate-officer doctrine to bring criminal charges against corporate executives whose companies may cause incidental harm to migratory birds.

*Service Response:* Decisions regarding whether to file criminal charges are made by the Department of Justice, in accordance with publicly available policies of that Department. In the decades prior to the January 7 rule, the Service is not aware of charges having been brought by the Department of Justice against corporate executives for incidental take, under the MBTA, caused by their companies.

*Comment:* Application of the MBTA to incidental take is inconsistent with the Service's general regulation defining "take" to mean "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt [those acts]." 50 CFR 10.12. Each of these words connotes an active effort to harm a migratory bird and thus excludes actions that may incidentally and indirectly lead to such harm.

*Service Response:* This argument is simply an extension of the *noscitur a sociis* argument that relies on interpreting terms such as "kill," "wound," and "capture" as unambiguously

referring to acts directed at migratory birds because of their placement in a list of other terms that can only be construed as directed at birds. However, the fact that those terms could equally apply to incidental conduct undermines that argument. Moreover, the Service clearly did not interpret its own regulation in that manner when it enforced the MBTA in the context of incidental take for over 40 years prior to publication of the Jorjani Opinion. Moreover, Executive Order 13186, which interprets the term “take” in 50 CFR 10.12 to apply to both intentional and unintentional take, has not been amended or repealed since its issuance in 2001 (66 FR 3853, January 17, 2001). The Service’s interpretation of 50 CFR 10.12 to apply to incidental taking and killing in the context of the MBTA has been longstanding prior to 2017, and thus, the revocation rule is not breaking new ground and is not inconsistent with that regulation.

*Comment:* The revocation of an existing rule requires an environmental assessment under NEPA. Because the Service drafted an EIS to accompany the original rule after determining it was a major Federal action, revocation is also a major Federal action requiring further NEPA review.

*Service Response:* Revocation of the existing rule and a return to the Service’s prior interpretation of the MBTA is addressed in the EIS associated with the January 7 rule as Alternative B. We have issued a new Record of Decision that reflects our selection of Alternative B and describes how we will implement that alternative. Supplementation of the prior EIS is not necessary as none of the criteria for supplementation have been met. Our determination that supplementing the prior EIS is not necessary is explained in more detail in the Record of Decision (ROD) associated with this revocation rule, which is available at <https://www.fws.gov/regulations/mbta/resources>.

*Comment:* It is improper to ignore three different circuit court conclusions that conclude the MBTA does not prohibit incidental take and instead rely on a district court decision.

*Service Response:* As explained in the preamble to this final rule, we have not ignored the conclusions of any of the circuit courts that have ruled on this issue. One circuit court has clearly

held that the MBTA does not prohibit incidental take, and two circuit courts have held that it does. Other circuit courts have opined on the issue in dicta. We have assessed all these court decisions in reaching our decision to revoke the January 7 rule.

*Comment:* The Service should not write a regulation to declare the scope and meaning of a statute over 100 years after its enactment. The Service should revoke the January 7 rule but should not replace it with a regulation codifying a different interpretation of the MBTA.

*Service Response:* While we agree with the commenter that the January 7 rule should be revoked, we do not agree that the Service lacks authority to interpret the MBTA. Congress specifically provided the Secretary of the Interior with the authority to implement the MBTA. The Secretary has delegated that authority to the Service. Implementation of legislation often requires an agency to clarify language in the statute that is ambiguous and impliedly left to the agency's discretion to interpret and clarify. An agency may also clarify the plain meaning of a statute if it determines there is no ambiguity.

*Comment:* Revoking the January 7 rule would result in significant uncertainty and potentially harsh and inequitable consequences for key sectors of U.S. industry through a return to uneven enforcement discretion.

*Service Response:* The Service agrees that splits of opinion in circuit courts regarding the applicability of incidental take requires clarification, which the Service has the authority to address through enforcement discretion and policy. However, the Service has a history of working with industry to employ best practices to reduce incidental take under the MBTA and pursued only the most egregious offenders. Thus, the Service disagrees that application of enforcement discretion will result in "harsh and inequitable consequences." Further, the Service will continue to develop clearer standards for regulation of incidental take to reduce uncertainty and to ensure enforcement is not uneven. We have also issued a Director's Order concurrently with this final rule that clarifies our current enforcement position and how the Service will prioritize enforcement actions when this rule becomes effective.

*Comment:* The Service should retain a bright-line standard that the MBTA does not prohibit incidental take. A bright-line rule provides important certainty to a wide range of entities.

*Service Response:* While we disagree that the MBTA does not prohibit incidental take, we agree that a bright-line standard is a preferable long-term solution to address actions that incidentally take migratory birds. We will continue to work, after publication of this revocation rule, to develop a bright-line standard governing regulation of incidental take under the MBTA that provides certainty to regulated entities.

*Comment:* Retaining the January 7 rule will not result in significant negative impacts to avian species because companies are already motivated to conserve those species through implementation of best management practices and are already subject to a wide range of other Federal, State, and local avian protection laws.

*Service Response:* The Service understands that a number of other Federal, State, and local laws and regulations provide some protection to birds. However, these laws and regulations vary by State, and companies are currently free to cease best practices that were undertaken based on compliance with the MBTA. This situation has significant potential for negative impacts to migratory birds from current and future industry projects.

*Comment:* Retaining the January 7 rule will promote better dialogue and more cooperation by removing the potential for negative repercussions resulting from candid communications with the Service. Companies will work more collaboratively with the Service in an environment of certainty and mutual understanding. Current efforts are supporting migratory birds and reducing impacts, including voluntary efforts like the Land-based Wind Energy Guidelines and Avian Protection Plan Guidelines for power lines, as well as grant programs like America's Conservation Enhancement Act of 2020, Neotropical Migratory Bird Conservation Act, Great American Outdoors Act, Farm Bills, and the North American Waterfowl Management Plan.

*Service Response:* The Service agrees that industries attempting to employ best practices deserve encouragement and support from the Service, including candid communications. The Service will continue to work collaboratively after revocation of this rule to create clear and achievable standards for regulated entities. The Service agrees that the grant programs mentioned help to conserve and restore habitat for migratory birds and that the guidelines provide useful suggestions that some industries may follow to help avoid or reduce incidental take of migratory birds. The Service concludes, however, that prohibition of incidental take is consistent with the best interpretation of the MBTA and that this tool is necessary to help slow the decline of many species of migratory birds.

*Comment:* One commenter stated that the January 7 rule should not be revoked because it provides regulatory certainty and supports current efforts to improve U.S. infrastructure.

*Service Response:* While the Service agrees that the January 7 rule provides regulatory certainty, we also believe that prohibition of incidental take is consistent with the best legal interpretation under the MBTA. Further, the Service has a long track record of working with industry to avoid and minimize incidental take while also allowing infrastructure plans to proceed. The Service disagrees with the assertion that revoking the January 7 rule will inevitably add significant cost and delays to the implementation of infrastructure programs, nor does it agree with the assertion that protecting migratory birds from incidental take will delay climate benefits provided by new, resilient infrastructure.

*Comment:* The Service has failed to provide an adequate rationale for its change in policy and position on whether the MBTA prohibits incidental take, and thus violates the Administrative Procedure Act.

*Service Response:* We respectfully disagree and refer the commenter to the detailed explanation and rationale provided in the preamble to this rule. It is important to note that this rule, by its terms, does nothing more than revoke the language at 50 CFR 10.14 that codifies an interpretation that the MBTA does not prohibit incidental take. We are not proposing

replacement language at this time. However, we will propose to do so in the near future and continue to develop and publish policies and regulations that provide the public with greater certainty regarding compliance with the MBTA.

*Comment:* In the January 7 rule, the Service stated it had grave constitutional due process concerns with the prior agency practice of using enforcement discretion to implement the Service's prior interpretation that the MBTA prohibits incidental take. The Service has not explained why those due process concerns have disappeared in considering revocation of the January 7 rule.

*Service Response:* In promulgating this revocation rule, we reevaluated the constitutional concerns we previously categorized as grave. Our previous enforcement policy implemented prior to the Jorjani Opinion was exercised judiciously, focusing on implementation of best practices by various industries to mitigate incidental take of migratory birds. The Service's practice was to notify industries that their actions caused incidental take and give them an opportunity to implement best practices to avoid or mitigate that take prior to bringing any enforcement action. This approach is entirely consistent with that set forth by the Tenth Circuit Court of Appeals in *United States v. Apollo Energies*, an approach the court considered would alleviate any due process concerns associated with using enforcement discretion to implement the statute in the context of incidental take. A close examination of the past history of the Service's exercise of enforcement discretion simply does not invoke significant constitutional due process concerns. Moreover, after revocation of the January 7 rule, we will develop further policy to implement our interpretation that the MBTA prohibits incidental take to provide the public with greater certainty regarding enforcement, including promulgating a regulation that codifies our current interpretation of the MBTA. We have also issued a Director's Order concurrently with the publication of this rule that explains in more detail our enforcement priorities regarding incidental take of migratory birds and published an advance notice of proposed rulemaking to seek public input on an authorization framework. Both actions will

provide the public with more clarity regarding compliance with the MBTA and alleviate any potential remaining constitutional due process concerns.

*Comment:* The Service should take public comment on alternatives to the proposed revocation rather than framing the proposed rule as a take-it-or-leave-it offer.

*Service Response:* At this stage, the Service simply proposed to revoke the January 7 rule and return to the longstanding prior agency practice of interpreting the MBTA to prohibit incidental take. The alternatives of keeping the rule in place or revoking it are entirely consistent with the alternatives proposed during development of the January 7 rule and analyzed in the accompanying EIS. Thus, the proposal to revoke that rule was entirely in keeping with the approach taken in the January 7 rule itself. As explained in the Record of Decision for this rulemaking, the Service will develop additional steps to clarify its implementation of Alternative B of the EIS developed in association with the January 7 rule. The Service will provide the public with opportunities to comment on reasonable implementation alternatives throughout that process.

*Comment:* Interpreting the MBTA to prohibit incidental take produces absurd results, such as prosecution of bird deaths caused by automobiles, airplanes, plate-glass modern office buildings, or picture windows in residential buildings.

*Service Response:* This concern is simply not borne out by the Service's past practice. The Service has not brought an enforcement action for any of the actions presented by the commenter as absurd targets of enforcement. Interpreting the MBTA to prohibit incidental take has not led to absurd results in the past, and this past practice demonstrates there is no reason to believe it will lead to absurd results in the future. The Service also notes, as reflected in the associated Record of Decision, that this revocation rule is simply the first step in a process to implement a fair and public process to clarify the scope of the MBTA as it relates to incidental take and explain how regulated entities may comply with the MBTA in that context.

*Comment:* Revoking the January 7 rule could potentially subject to criminal liability an effectively limitless number of lawful everyday activities. No one would have fair notice of which of their daily activities could cause them to commit a Federal crime, and no one can sufficiently conform their behavior to fully avoid that liability.

*Service Response:* We do not agree that simply revoking the January 7 rule will automatically subject a limitless number of everyday activities to potential criminal liability. That scenario has never been the case under the Service's past enforcement of the MBTA and will not be the case after revocation of the January 7 rule. Prior to issuance of the Jorjani Opinion, the Service followed the direction of the 10th Circuit Court of Appeals in the *United States v. Apollo Energies* case by providing potential violators with notice of any activities that are causing incidental take and an opportunity to correct or mitigate that take before considering moving forward with an enforcement action. The Service has published an enforcement policy in the form of a Director's Order concurrently with this rule and will provide further clarification regarding its approach to enforcing the MBTA after revocation of the January 7 rule. This approach will give the regulated community fair notice of what actions the Service will consider to be violations of the statute.

*Comment:* The Service should not use potential funding that could be generated by criminalizing incidental take as a basis for revoking the January 7 rule.

*Service Response:* The Service did not intend to suggest that funding of the North American Wetlands Conservation Act fund through criminal fines resulting from enforcement of incidental take provides a basis for revoking the January 7 rule. Our intent in including this information is to provide a complete accounting to the public on the effect of the January 7 rule's codification of an interpretation that the MBTA does not prohibit incidental take.

*Comment:* The Service should retain the January 7 rule and review all MOUs (memorandums of understanding) drafted pursuant to Executive Order 13186 to ensure they conform to the January 7 rule.



*Service Response:* Executive Order 13186 and any MOUs entered into to comply with the Executive order have remained in effect through both the January 7 rulemaking and this rulemaking to revoke the January 7 rule. The various interagency MOUs conform to the Executive Order and are not contingent on any rulemaking interpreting whether the MBTA prohibits or excludes incidental take.

*Comment:* The MBTA's reliance on criminal penalties may be an appropriate deterrence for illegal hunting or trade, but not for unintentional take. If the MBTA is read to apply to any and all take of migratory birds, the agency is left to decide, with minimal direction, what causes of bird mortality to pursue, and among those, what conduct warrants sanctions. However, the Service can easily provide greater certainty, and make better use of its own resources, through the issuance of a formal MBTA enforcement policy issued contemporaneously with adoption of the proposed revocation rule.

*Service Response:* The Service agrees that applying the MBTA to each and every case of incidental take of a migratory bird is not feasible or desirable and would not be an efficient use of agency resources. The Service also agrees that issuing a formal enforcement policy upon revocation of the January 7 rule would be beneficial and provide the public with greater certainty regarding what activities may be subject to enforcement. Therefore, the Service has issued an enforcement policy in the form of a Director's Order upon publication of this rule to revoke the January 7 rule as part of a broader strategy to provide the public with greater certainty regarding what the MBTA prohibits along with guidance to achieve compliance.

*Comment:* If the Service determines that revocation of the 2021 rule is necessary, the Service must take the appropriate steps to resolve the regulatory uncertainty and enforcement concerns that stem from that approach. In promulgating regulations and establishing a program to address incidental take, the Service must use the authority provided by section 2 of the MBTA to craft exceptions to the conduct prohibited under the MBTA.

*Service Response:* The Service will take this comment into account in considering whether to develop an authorization framework for incidental take after finalizing this revocation rule. The Service is considering various methods to standardize enforcement, provide public certainty, and authorize incidental take, but those issues are beyond the scope of this rulemaking. Developing regulations that authorize incidental take and provide specific exceptions are among the options the Service is considering.

*Comment:* If the January 7 rule is revoked, one State agency stated it will lose the benefit of being shielded from incidental take liability when conducting habitat-enhancement activities, such as prescribed burns. That State requested that the Service create an exemption for such activities and proposed specific language for the exemption.

*Service Response:* The Service will take this comment into account in considering whether to develop an authorization framework for incidental take after finalizing this revocation rule. We will also consider the request for exceptions or exemptions, as well as the specific language provided by the commenter, in such a framework. We recognize that habitat-enhancement activities, including prescribed burns, can result in incidental take in the short term but can also provide positive benefits to migratory birds in the medium-to-long term that may outweigh any short-term incidental take. For these reasons, prescribed burns following best management practices to enhance wildlife habitat were not a priority for enforcement during the several decades the Service interpreted the MBTA to prohibit incidental take prior to the change in interpretation precipitated by the Solicitor's Opinion, M-37050.

*Comment:* Given that the Trump administration's interpretation of the MBTA was found invalid by a Federal court, the commenter was concerned the Service's slow approach to revoking the rule and enacting new rules to protect migratory birds will leave vulnerable bird populations unprotected for an unnecessarily long period of time. We encourage the Service to move quickly to restart enforcement of the MBTA against industrial actions that lead to harm or death of birds.

*Service Response:* With this rule, the Service has revoked the January 7 rule. We have issued a Director's Order concurrently with this rule that explains our enforcement policy when the revocation rule becomes effective.

*Comment:* Revoking the January 7 rule is a necessary first step to comply with congressional language and intent and protect migratory birds from additional population declines. But the Service must not stop there. A robust regulatory system is necessary to reduce the rate of incidental take associated with many types of commercial, agricultural, and industrial activities. The energy and telecommunications sectors in particular must be better regulated to reduce incidental take.

*Service Response:* The Service does not intend revocation of the January 7 rule to be the last step in implementing the MBTA. The Service is considering various methods to standardize enforcement, provide public certainty, and authorize incidental take. Developing regulations that authorize incidental take by providing a permit system, regulatory authorizations, or specific exceptions are among the options the Service is considering.

*Comment:* The bycatch of seabirds in fisheries is a conservation concern that the Service can effectively mitigate through the establishment of a regulatory process that incorporates conservation measures into incidental take permits.

*Service Response:* The Service agrees that incidental bycatch of seabirds is a serious conservation concern. We will evaluate this proposal as we consider and develop methods that include standardization of enforcement, providing greater public certainty, and potential authorization of incidental take.

*Comment:* The SBREFA (Small Business Regulatory Enforcement Fairness Act) analysis and other potentially important analyses of the impacts of the proposed revocation were missing from the rulemaking docket.

*Service Response:* The Service completed the SBREFA analysis and all other required analyses and included the summary in the proposed rule preamble. Unfortunately, the documents

themselves were not included in the rulemaking docket at [www.regulations.gov](http://www.regulations.gov) with the proposed rule. To resolve this issue, the Service made the initial regulatory flexibility analysis and the revised regulatory impact analysis available for public review and comment prior to finalizing this rule and the Record of Decision (86 FR 38354, July 20, 2021).

*Comment:* One commenter recommended reopening public comment for 60 days with separate comment periods for the Regulatory Flexibility Act analysis.

*Service Response:* The Service concluded that a 30-day comment period was sufficient for this rulemaking. The Service also provided an additional 30-day comment period for public review of the Regulatory Flexibility Act analysis and regulatory impact analysis. The issues central to this rulemaking have already been vetted through multiple public comment periods for the January 7 rule and associated NEPA analysis and the rule extending the effective date of the January 7 rule. Therefore, the Service concluded a 30-day comment period is sufficient for this rulemaking.

*Comment:* The Service should allow Federal courts to determine the scope of what the MBTA proscribes and adopt prosecutorial guidelines that outline the circumstances in which the Federal Government will file criminal prosecutions under the MBTA. The executive branch has relied on the prosecutorial discretion approach to refrain from prosecuting MBTA cases where there was no element of intentional misconduct or grossly culpable negligence for decades. However, some unwarranted prosecutions have occurred. The executive branch should write fresh guidelines based on a standard of due care, rather than strict liability, with the benefit of stakeholder input rather than the Service codify its interpretation of the statute.

*Service Response:* The Service does not agree that waiting for Federal courts to coalesce around a specific interpretation of the MBTA is the correct path forward. Instead, the Service is developing regulations and policy to provide the public and the regulated community with a degree of certainty regarding what constitutes a violation of the MBTA. We agree that an enforcement policy may be a productive way to police incidental take under the MBTA,

particularly in the near term; accordingly, we have issued a Director's Order concurrently with this final rule that explains how we will prioritize our enforcement resources in the context of incidental take.

*Comment:* Malicious intent must be present in order to warrant criminal proceedings for the take of migratory birds.

*Service Response:* The misdemeanor provision of the MBTA has long been interpreted by Federal courts as a strict liability crime. Requiring malicious intent before the Service initiates an enforcement action would not be consistent with the statutory language or the relevant court cases. However, as mentioned previously, the Service issued a Director's Order concurrently with this final rule that explains how we will prioritize our enforcement resources in the context of incidental take.

## **Required Determinations**

### *National Environmental Policy Act*

Because we are revoking the January 7 MBTA rule, we rely on the final EIS developed to analyze that rule in determining the environmental impacts of revoking it: "Final Environmental Impact Statement; Regulations Governing Take of Migratory Birds," available on <http://www.regulations.gov> in Docket No. FWS-HQ-MB-2018-0090. The alternatives analyzed in that EIS cover the effects of interpreting the MBTA to both include and exclude incidental take. In finalizing this rule, we have published an amended Record of Decision that explains our decision to instead select the environmentally preferable alternative, or Alternative B, in the final EIS. Any additional, relevant impacts on the human environment that have occurred subsequent to our initial Record of Decision are described in the amended Record of Decision.

### *Government-to-Government Relationship with Tribes*

In accordance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior's manual at 512 DM 2, we considered the possible effects of this rule on federally recognized Indian Tribes. The Department of the

Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty.

We evaluated the January 7 rule that this rule would revoke under the criteria in Executive Order 13175 and under the Department's Tribal consultation policy and determined that the January 7 rule may have a substantial direct effect on federally recognized Indian Tribes. We received requests from nine federally recognized Tribes and two Tribal councils for government-to-government consultation on that rule. Accordingly, the Service initiated government-to-government consultation via letters signed by Regional Directors and completed the consultations before issuing the January 7 final rule. During these consultations, there was unanimous opposition from Tribes to the reinterpretation of the MBTA to exclude coverage of incidental take under the January 7 rule. Thus, revoking the January 7 rule is consistent with the requests of federally recognized Tribes during those consultations.

#### *Energy Supply Distribution*

E.O. 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. As noted above, this rule is a significant regulatory action under E.O. 12866, but the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The action has not been otherwise designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) as a significant energy action. Therefore, no Statement of Energy Effects is required.

#### *Endangered Species Act*

Section 7 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531–44), requires that the Secretary of the Interior shall review other programs administered by her and utilize such programs in furtherance of the purposes of the Act (16 U.S.C. 1536(a)(1)). It further states that each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to

jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat (16 U.S.C. 1536(a)(2)). We have determined that this rule revoking the January 7 rule regarding the take of migratory birds will have no effect on ESA-listed species within the meaning of ESA section 7(a)(2).

*Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order (E.O.) 12866 provides that OMB–OIRA will review all significant rules. OMB–OIRA has determined that this rule is economically significant. OIRA has also determined that this is a major rule under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act or CRA). 5 U.S.C. 804(2). *See* OIRA Conclusion of EO 12866 Regulatory Review of the MBTA, *available at* <https://www.reginfo.gov/public/do/eoDetails?rrid=131383> (designating the MBTA rule as a major rule under the CRA). The CRA provides that major rules shall not take effect for at least 60 days after publication in the *Federal Register* (5 U.S.C. 801(a)(3)). This rule will therefore be submitted to each House of Congress and the Comptroller General in compliance with the CRA. 5 U.S.C. 801(a).

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these requirements.

This final regulation revokes the January 7 MBTA rule. The legal effect of this rule removes from the Code of Federal Regulations (CFR) the interpretation that incidental take of

migratory birds is not prohibited under the MBTA, based on the rationale explained in the preamble. As explained in the preamble, the Solicitor's Opinion (M-37050) that formed the basis for the January 7 rule was overturned in court and has since been withdrawn by the Solicitor's Office. By removing § 10.14 from subpart B of title 50 CFR, USFWS would revert to implementing the statute without an interpretative regulation governing incidental take, consistent with judicial precedent. This would mean that incidental take can violate the MBTA to the extent consistent with the statute and judicial precedent. Enforcement discretion will be applied, subject to certain legal constraints.

The Service conducted a regulatory impact analysis of the January 7 rule, which can be viewed online at <http://www.regulations.gov> in Docket No. FWS-HQ-MB-2018-0090. In that analysis, we analyzed the effects of an alternative (Alternative B) where the Service would promulgate a regulation that interprets the MBTA to prohibit incidental take consistent with the Department's longstanding prior interpretation. By reverting to this interpretation, the Service views the incidental take of migratory birds as a potential violation of the MBTA, consistent with judicial precedent.

The primary benefit of this rule results from decreased incidental take. While we are unable to quantify the benefits, we expect this rule to result in increased ecosystem services and benefits to businesses that rely on these services. Further, benefits will accrue from increased birdwatching opportunities. The primary cost of this rule is the compliance cost incurred by industry, which is also not quantifiable based on current available data. Firms are more likely to implement best practice measures to avoid potential fines. Additionally, potential fines generate transfers from industry to the government. Using a 10-year time horizon (2022–2031), the present value of these transfers is estimated to be \$149.3 million at a 7-percent discount rate and \$174.6 million at a 3-percent discount rate. This would equate to an annualized value of \$14.9 million at a 7-percent discount rate and \$17.5 million at a 3-percent discount rate.

*Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act*



Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small businesses, small organizations, and small government jurisdictions. However, in lieu of an initial or final regulatory flexibility analysis (IRFA or FRFA), the head of an agency may certify on a factual basis that the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. Thus, for an IRFA/FRFA to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” *See* 5 U.S.C. 605(b). We prepared a FRFA, briefly summarized below, to accompany this rule that can be viewed online at <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090.

This final rule may affect industries that typically incidentally take substantial numbers of birds and with which the Service has worked to reduce those effects (table 1). In some cases, these industries have been subject to enforcement actions and prosecutions under the MBTA prior to the issuance of M–37050. The vast majority of entities in these sectors are small entities, based on the U.S. Small Business Administration (SBA) small business size standards. It is important to note that many small businesses will not be affected under this rule. Only those businesses that reduced best management practices that avoid or minimize incidental take of migratory birds as a result of the issuance of M–37050 in January 2017 and the January 7, 2021, rule will incur costs. The following analysis determines whether a significant number of small businesses reduced best management practices and will be impacted by this rule.

TABLE 1—DISTRIBUTION OF BUSINESSES WITHIN AFFECTED INDUSTRIES

<b>NAICS Industry Description</b>	<b>NAICS Code</b>	<b>Number of Businesses</b>	<b>Small Business Size Standard (number of employees)</b>	<b>Number of Small Businesses</b>
Finfish Fishing	114111	1,210	20 <sup>(a)</sup>	1,185
Crude Petroleum and Natural Gas Extraction	211111	6,878	1,250	6868
Drilling Oil and Gas Wells	213111	2,097	1,000	2092
Solar Electric Power Generation	221114	153	250	153
Wind Electric Power Generation	221115	264	250	263
Electric Bulk Power Transmission	221121	261	500	214
Electric Power Distribution	221122	7,557	1,000	7520
Wireless Telecommunications Carriers (except Satellite)	517312	15,845	1,500	15831

Source: U.S. Census Bureau, 2012 County Business Patterns.

<sup>a</sup>Note: The SBA size standard for finfish fishing is \$22 million. Neither Economic Census, Agriculture Census, nor the National Marine Fisheries Service collect business data by revenue size for the finfish industry. Therefore, we employ other data to approximate the number of small businesses. Source: U.S. Census Bureau, 2017 Economic Annual Survey.

Since the Service does not currently have a permitting system dedicated to authorizing incidental take of migratory birds, the Service does not have specific information regarding how many businesses in each sector implement measures to reduce incidental take of birds. Not all businesses in each sector incidentally take birds. In addition, a variety of factors would influence whether, under the previous interpretation of the MBTA, businesses would implement such measures. It is also unknown how many businesses continued or reduced practices to reduce the incidental take of birds since publication of the Solicitor's Opinion M-37050 or issuance of the January 7 rule. The Service specifically requested public comment on any reliance interests on the January 7 rule. We did not receive sufficient information on that issue during the public comment periods associated with the January 7 rule and associated NEPA analysis, the February 9 rule extending the effective date of the January 7 rule, or the proposed rule and no comments were submitted by any entities identifying reduced implementation of measures that would have to be reinstated when this rule becomes effective. We did receive comments that stated that they

did not reduce best management practices after the January 7 rule. These comments support our estimate that most entities did not reduce best management practices as a result of the January 7 rule excluding incidental take from the scope of the MBTA. In revoking the January 7 rule, any subsequent incidental take of migratory birds could violate the MBTA, consistent with the statute and judicial precedent. Some small entities will incur costs if they reduced best management practices after M-Opinion 37050 was issued in January 2017 or after promulgation of the January 7, 2021, rule and will need to subsequently reinstate those practices if the January 7 rule is revoked, assuming they did not already reinstate such practices after vacatur of M-Opinion 37050.

### *Summary*

Table 2 identifies examples of bird mitigation measures, their associated costs, and why available data are not extrapolated to the entire industry sector or small businesses. We requested public comment so we can extrapolate data, if appropriate, to each industry sector and any affected small businesses. In response, we received information from the solar industry, which we utilized in this analysis where applicable. Table 3 summarizes likely economic effects of the rule on the business sectors identified in table 1. In many cases, the costs of actions businesses typically implement to reduce effects on birds are small compared to the economic output of business, including small businesses, in these sectors. The likely economic effects summarized in table 3 were collected during the public comment periods associated with the January 7 rule and associated NEPA analysis, the February 9 rule extending the effective date of the January 7 rule, and the proposed rule.

TABLE 2—BEST MANAGEMENT PRACTICES COSTS BY INDUSTRY<sup>1</sup>

<b>NAICS Industry</b>	<b>Example of Bird Mitigation Measure</b>	<b>Estimated Cost</b>	<b>Why data are not extrapolated to entire industry or small businesses</b>
Finfish Fishing (NAICS 11411)	Changes in design of longline fishing hooks, changes in offal management practices, use of	<ul style="list-style-type: none"> <li>Costs are per vessel per year</li> <li>\$1,400 for thawed blue-dyed bait</li> </ul>	<ul style="list-style-type: none"> <li>No data available on fleet size</li> <li>No data available on how many</li> </ul>

	flagging or streamers on fishing lines	<ul style="list-style-type: none"> <li>• \$150 for strategic offal discards</li> <li>• \$4,600 for Tori line</li> <li>• \$4,000 one-time cost for underwater setting chute</li> <li>• \$4,000 initial and \$50 annual for side setting</li> </ul>	measures are employed on each vessel
Crude Petroleum and Natural Gas Extraction NAICS (211111)	<ul style="list-style-type: none"> <li>• Netting of oil pits and ponds</li> <li>• Closed wastewater systems</li> </ul>	<ul style="list-style-type: none"> <li>• \$130,680 to \$174,240 per acre to net ponds</li> <li>• Most netted pits are <math>\frac{1}{4}</math> to <math>\frac{1}{2}</math> acre</li> <li>• Cost not available for wastewater systems</li> </ul>	<ul style="list-style-type: none"> <li>• Infeasible to net pits larger than 1 acre due to sagging</li> <li>• Size distribution of oil pits is unknown</li> <li>• Average number of pits per business is unknown</li> <li>• Closed wastewater systems typically used for reasons other than bird mitigation</li> </ul>
Drilling Oil and Gas Wells (NAICS 213111)	<ul style="list-style-type: none"> <li>• Netting of oil pits and ponds</li> <li>• Closed loop drilling fluid systems</li> </ul>	<ul style="list-style-type: none"> <li>• \$130,680 to \$174,240 per acre to net ponds</li> <li>• Cost not available for closed loop drilling fluid systems, but may be a net cost savings in arid areas with water conservation requirements</li> </ul>	<ul style="list-style-type: none"> <li>• Infeasible to net pits larger than 1 acre due to sagging</li> <li>• Size distribution of oil pits is unknown</li> <li>• Average number of pits per business is unknown</li> <li>• Closed loop drilling fluid systems typically used for reasons other than bird mitigation</li> <li>• High variability in number of wells drilled per year (21,200 in 2019)</li> </ul>
Solar Electric Power Generation (NAICS 221114)	<ul style="list-style-type: none"> <li>• Pre- and post-construction bird surveys</li> <li>• Compliance with Avian Power Line Interaction Committee standards</li> <li>• Installation of anti-perch devices</li> </ul>	\$3,000 for two rounds of bird surveys on 200-acre site for pre-and post-construction, and up to \$10,000 if travel and site preparation included	New projects can vary from 100 to 5,000 acres in size, and mortality surveys may not scale linearly

	<ul style="list-style-type: none"> <li>• Light management measures</li> <li>• Storage of water in covered tanks</li> </ul>		
Wind Electric Power Generation (NAICS 221115)	<ul style="list-style-type: none"> <li>• Pre-construction adjustment of turbine locations to minimize bird mortality during operations</li> <li>• Pre- and post-construction bird surveys</li> <li>• Retrofit power poles to minimize eagle mortality</li> </ul>	<ul style="list-style-type: none"> <li>• Cost not available for adjustment of turbine construction locations</li> <li>• \$100,000 to \$500,000 per facility per year for pre-construction site use and post-construction bird mortality surveys</li> <li>• \$7,500 per power pole with high variability of cost</li> <li>• Annual nationwide labor cost to implement wind energy guidelines: \$17.6M</li> <li>• Annual nationwide non-labor cost to implement wind energy guidelines: \$36.9M</li> </ul>	<ul style="list-style-type: none"> <li>• Data not available for adjustment of turbine construction locations</li> <li>• High variability in survey costs and high variability in need to conduct surveys</li> <li>• High variability in cost and need to retrofit power poles</li> </ul>
Electric Bulk Power Transmission (NAICS 221121)	Retrofit power poles to minimize eagle mortality	\$7,500 per power pole with high variability of cost	High variability in cost and need to retrofit power poles
Electric Power Distribution (NAICS 221122)	Retrofit power poles to minimize eagle mortality	\$7,500 per power pole with high variability of cost	High variability in cost and need to retrofit power poles
Wireless Telecommunications Carriers (except Satellite) (NAICS 517312)	<ul style="list-style-type: none"> <li>• Extinguish non-flashing lights on towers taller than 350'</li> <li>• Retrofit towers shorter than 350' with LED flashing lights</li> </ul>	<ul style="list-style-type: none"> <li>• Industry saves hundreds of dollars per year in electricity costs by extinguishing lights</li> <li>• Retrofitting with LED lights requires initial cost outlay, which is recouped over time due to lower energy costs and reduced maintenance</li> </ul>	Data not available for number of operators who have implemented these practices

<sup>1</sup>Sources: FWS personnel, National Oceanic and Atmospheric Administration Revised Seabird Regulations Amendment, eccnetting.com, statista.com, aerion.com, FWS Wind Energy Guidelines, FWS Public Records Act data, FWS Eagle Conservation Plan Guidance.

TABLE 3—SUMMARY OF ECONOMIC EFFECTS ON SMALL BUSINESSES

<b>NAICS Industry Description (NAICS Code)</b>	<b>Potential bird mitigation measures under this rule</b>	<b>Economic effects on small businesses</b>	<b>Rationale</b>
Finfish Fishing (11411)	Changes in design of longline fishing hooks, changes in offal management practices, and flagging/streamers on fishing lines	Likely minimal effects	Seabirds are specifically excluded from the definition of bycatch under the Magnuson-Stevens Fishery Conservation and Management Act and, therefore, seabirds not listed under the ESA may not be covered by any mitigation measures. The impact of this on small entities is unknown.
Crude Petroleum and Natural Gas Extraction (21111)	Using closed waste-water systems or netting of oil pits and ponds	Likely minimal effects	Thirteen States have regulations governing the treatment of oil pits such as netting or screening of reserve pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, this rule is unlikely to affect a significant number of small entities.
Drilling Oil and Gas Wells (21311)	Using closed waste-water systems or netting of oil pits and ponds	Likely minimal effects	Thirteen States have regulations governing the treatment of oil pits, such as netting or screening of reserve pits, including measures beneficial to birds. In addition, much of the industry is increasingly using closed systems, which do not pose a risk to birds. For these reasons, this rule is unlikely to affect a significant number of small entities.
Solar Electric Power Generation (22114)	Monitoring bird use and mortality at facilities, limited use of deterrent systems such as streamers and reflectors	Likely minimal effects	Bird monitoring in some States may continue to be required under State policies. The number of States and the policy details are unknown. The Solar Energy Industry Association is not aware of any companies that reduced best management practices as a result of the January 7 rule.
Wind Electric Power Generation (22115)	Following Wind Energy Guidelines, which involve conducting risk assessments for siting facilities	Likely minimal effects	Following the Wind Energy Guidelines has become industry best practice and would likely continue. In addition, the industry uses these guidelines to aid in reducing effects on other regulated species like eagles and threatened and endangered bats.
Electric Bulk Power Transmission (22121)	Following Avian Power Line Interaction Committee	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take

	(APLIC) guidelines		of eagles, regulated under the Bald and Golden Eagle Protection Act.
Electric Power Distribution (221122)	Following Avian Power Line Interaction Committee (APLIC) guidelines	Likely minimal effects	Industry would likely continue to use APLIC guidelines to reduce outages caused by birds and to reduce the take of eagles, regulated under the Bald and Golden Eagle Protection Act.
Wireless Telecommunications Carriers (except Satellite) (517312)	Installation of flashing obstruction lighting	Likely minimal effects	Industry will likely continue to install flashing obstruction lighting to save energy costs and to comply with recent Federal Aviation Administration Lighting Circular and Federal Communication Commission regulations.

We developed an IRFA out of an abundance of caution to ensure that economic impacts on small entities are fully accounted for in this rulemaking process and published it for public comment. We considered those comments and developed a FRFA that can be viewed online at <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090. After further review, we have determined that this rule will not have an impact on a substantial number of small entities. The January 7 rule was in effect for less than 1 year, and many comments from industries stated that they did not make changes in the implementation of best practices in response to the January 7 rule because they continued to follow various regulations and guidance (as shown in table 3). The Service expects the impact of this rule will be minimal because entities did not reduce best management practices as a result of the January 7 rule excluding incidental take from the scope of the MBTA. Therefore, we certify that this rule will not have a significant economic impact on a substantial number of small entities.

#### *Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we have determined the following:

- a. This rule would not “significantly or uniquely” affect small government activities. A small government agency plan is not required.

b. This rule would not produce a Federal mandate on local or State government or private entities. Therefore, this action is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

### *Takings*

In accordance with E.O. 12630, this rule does not contain a provision for taking of private property and would not have significant takings implications. A takings implication assessment is not required.

### *Federalism*

This rule will not create substantial direct effects or compliance costs on State and local governments or preempt State law. Some States may choose not to enact changes in their management efforts and regulatory processes and staffing to develop and or implement State laws governing birds, likely accruing benefits for States. Therefore, this rule would not have sufficient federalism effects to warrant preparation of a federalism summary impact statement under E.O. 13132.

### *Civil Justice Reform*

In accordance with E.O. 12988, we determine that this rule will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

### *Paperwork Reduction Act*

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### **List of Subjects in 50 CFR Part 10**

Exports, Fish, Imports, Law enforcement, Plants, Transportation, Wildlife.

### **Regulation Removal**



For the reasons described in the preamble, we hereby amend subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

**PART 10—GENERAL PROVISIONS**

1. The authority citation for part 10 continues to read as follows:

**Authority:** 16 U.S.C. 668a–668d, 703–712, 742a–742j-l, 1361–1384, 1401–1407, 1531–1543, 3371–3378; 18 U.S.C. 42; 19 U.S.C. 1202.

**§ 10.14 [Amended]**

2. Remove § 10.14.

**Shannon A. Estenoz**

*Assistant Secretary for Fish and Wildlife and Parks.*

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